

# EXHIBIT 139

NO. GV401286

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
ex rel.	)	
VEN-A-CARE OF THE	)	
FLORIDA KEYS, INC.	)	
Plaintiffs,	)	
	)	
VS.	)	TRAVIS COUNTY, TEXAS
	)	
ABBOTT LABORATORIES INC.,	)	
et al.	)	
Defendants.	)	201ST JUDICIAL DISTRICT

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ORAL AND VIDEOTAPED DEPOSITION OF  
BARBARA BENTON DEAN, AS CORPORATE  
REPRESENTATIVE OF HHSC AND INDIVIDUAL CAPACITY  
AUGUST 6, 2007  
VOLUME 2

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ORAL AND VIDEOTAPED DEPOSITION OF BARBARA  
BENTON DEAN, produced as a witness at the instance of  
the Defendants, Abbott Laboratories, Inc., Abbott  
Laboratories, and Hospira, Inc., and duly sworn, was  
taken in the above-styled and numbered cause on the 6th  
day of August, 2007, from 9:05 a.m. to 5:05 p.m., before  
Cynthia Warren, Certified Shorthand Reporter in and for  
the State of Texas, reported by machine shorthand, at  
the Office of the Attorney General, 300 West 15th  
Street, 12th Floor, Austin, Texas 78701, pursuant to the  
Texas Rules of Civil Procedure and the provisions stated  
on the record or attached hereto.

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<p style="text-align: right;">Page 185</p> <p>1 Texas -- how did Texas Medicaid determine at what number 2 to set that?</p> <p>3 A. It's an add-on factor at the end of the 4 prescription. The percentage has varied some over the 5 years. It's not some -- just an objective number that 6 we arrived at. There wasn't any specific study or 7 analysis. It's about 2 percent, 3 percent, 5 percent, 8 7 percent. It's currently 2 percent or 1.95 percent.</p> <p>9 Q. What are the policy considerations to 10 determining at what percent the inventory management 11 factor should be set?</p> <p>12 A. The policy consideration is always the same, 13 provide a reasonable dispensing fee.</p> <p>14 Q. How does Texas Medicaid determine whether the 15 dispensing fee is reasonable or not?</p> <p>16 A. We have tied -- in the past there were cost 17 surveys that pharmacists filled out, what does it 18 actually cost to dispense a prescription. We did a 19 survey -- Myers and Stauffer did a survey to look at the 20 cost of dispensing. We tried to tie the reasonable 21 dispensing fee to the cost of dispensing as the federal 22 regs require us to do. These have to be approved by the 23 centers for Medicare and Medicaid services.</p> <p>24 Q. Well, in September 1992 how did you determine 25 that the inventory management factor should be 7 percent</p>	<p style="text-align: right;">Page 187</p> <p>1 percent didn't change, but the percentage off of average 2 wholesale price was increased at that time.</p> <p>3 Q. (By Mr. Berlin) Staying focused on the 4 2 percent for the inventory management factor -- by the 5 way, we're -- under No. 29 it says, "Inventory 6 management factor, 0.98 percent." I just wanted to make 7 sure, that means 2 percent, right?</p> <p>8 A. Yes.</p> <p>9 Q. I misread it. It says 0.98, and that means 10 2 percent, right?</p> <p>11 A. That means a 2 percent add-on.</p> <p>12 Q. So you were saying the legislature directed 13 Texas Medicaid to lower reimbursement so I want to 14 understand, why was that number, inventory management 15 factor, set at 2 percent as opposed to some other 16 percent?</p> <p>17 A. That number was determined to be the 18 appropriate number at that time to provide for what we 19 believed was adequate reimbursement and to, at the same 20 time, be a portion of the reimbursement that would 21 provide savings to the State.</p> <p>22 Q. Was there any analysis as to exactly what the 23 inventory management factor should be?</p> <p>24 A. Not that I recall.</p> <p>25 Q. Was anyone -- who were the people who were</p>
<p style="text-align: right;">Page 186</p> <p>1 as opposed to 6 percent or 8 percent or some other 2 percent?</p> <p>3 MS. JACOBS: Objection, scope. We're 4 beyond the time period for discovery as set by the 5 judge.</p> <p>6 A. I came to work in the program in June of 1991, 7 so I don't know exactly that there was any -- how that 8 figure was arrived at. It's been a very long time.</p> <p>9 Q. (By Mr. Berlin) Can you turn to the next page 10 of Exhibit 840. And do you see under No. 29 it says, 11 "September 1, 1997 - New Fee effective \$5.27, Inventory 12 management factor 0.98, Delivery 0.15," and so there it 13 shows the inventory management factor has been moved 14 from 7 percent down to 2 percent, right?</p> <p>15 A. Yes.</p> <p>16 Q. So what were -- how did the Texas Medicaid 17 determine that the inventory management factor should be 18 moved down to 2 percent?</p> <p>19 MS. JACOBS: Objection, form.</p> <p>20 A. We were specifically directed by our 21 legislature to reduce reimbursement. This was our 22 effort at that. The fee went up or the dispensing 23 expense portion of the fee went up from 4.55 to 5.27. 24 The inventory management factor was reduced from 25 7 percent to 2 percent. And the wholesale costs and</p>	<p style="text-align: right;">Page 188</p> <p>1 responsible at looking at the inventory management 2 factor?</p> <p>3 MR. ANDERSON: Objection, beyond the 4 scope.</p> <p>5 A. That was done with program staff. Bob Harriss 6 at that time was the director of the program. Certainly 7 Patsy Napier was involved, Curtis, Martha, as well as 8 the rate-setting staff. It's a joint effort on the part 9 of the program as a whole. This was the result 10 following the lawsuit for the rates that we had 11 previously tried to implement.</p> <p>12 Q. (By Mr. Berlin) Let's go back in time for a 13 moment. In March of 1996 Texas Medicaid lowered the 14 dispensing fee down to \$3.00 for urban pharmacies and 15 \$4.00 for rural pharmacies, right?</p> <p>16 A. Yes.</p> <p>17 Q. And what were the policy considerations for 18 lowering the dispensing fee at that time?</p> <p>19 A. That was primarily determined by the 20 rate-setting area as a reimbursement that would meet the 21 fiscal needs of the state.</p> <p>22 Q. What do you mean, meet the fiscal needs of the 23 state?</p> <p>24 A. There was a direction to reduce reimbursement, 25 to move toward a more market-based reimbursement that</p>

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1    was consistent with what was going on in the marketplace 2    supposedly. 3    Q. Why do you say supposedly? 4    A. Well, that is sort of in opposition to the 5    federal directives for the Medicaid program. 6    Q. I'm sorry, what was your answer? 7    A. It doesn't particularly matter to the Medicaid 8    program what Blue Cross or ERS or TRS, how they're 9    reimbursing. There are federal regulations about 10   Medicaid which says pay a reasonable dispensing fee and 11   pay as close as you can to the actual acquisition costs 12   of the pharmacist. 13   Q. And prior to lowering the dispensing fee to 14   \$3.00 or \$4.00, the dispensing fee was what? 15   A. I believe it was 4.55. 16   Q. And did Texas Medicaid believe that that was a 17   reasonable dispensing fee? 18   A. I believe so, yes. 19   Q. Did it believe that it was over-reimbursing 20   pharmacists for dispensing costs? 21   A. It's never been our intent to over-reimburse 22   pharmacists. 23   Q. But did you -- did Texas Medicaid believe at 24   that time, in 1996 or prior to then, that it was 25   over-reimbursing pharmacists for their dispensing costs?	1    Q. But I'm referring back to where it was dropped 2    down to \$3.00 and \$4.00, and you had testified that -- 3    A. I'm sorry, I didn't realize you were talking 4    about that -- that drop. 5    Q. Yeah, the policy considerations were a 6    reasonable dispensing fee, and I was trying to 7    understand, Ms. Dean, the drop in the dispensing fee 8    wasn't because Texas Medicaid thought \$3.00 and \$4.00 9    would be a more reasonable dispensing fee; it was 10   because there were budgetary limitations, right? 11   MS. JACOBS: Objection, form. 12   MR. ANDERSON: Objection, scope. 13   A. There were budgetary limitations and there was 14   a sense in our legislature and our comptroller's office, 15   a number of places, that Medicaid reimbursement should 16   closer resemble other reimbursements in the marketplace 17   that are not driven by cost, actual costs. 18   Q. (By Mr. Berlin) What are they driven by? 19   A. Whatever they determine they want them to be 20   and whether or not they can contract with pharmacies at 21   that level. 22   Q. And did the folks in the Texas Medicaid agree 23   with that legislative assessment? 24   MR. ANDERSON: Objection, scope. 25   A. I'm not sure. Texas Medicaid is a big agency.
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1    MS. JACOBS: Objection, form. 2    A. I don't believe so. 3    Q. (By Mr. Berlin) What's your answer? 4    A. I don't believe so. 5    Q. So if it didn't believe that it was 6    over-reimbursing and it believed that it was paying a 7    reasonable dispensing fee, why did it lower the 8    dispensing fee at that time? 9    A. Because we were directed by our legislature to 10   do so. 11   Q. Were you directed to lower it specifically to 12   that amount? 13   A. I don't believe so. 14   Q. What was the legislative direction? 15   A. Typically there's a number that's removed from 16   our budget, a dollar number. 17   Q. In other words, you had a certain budget which 18   meant you could only pay out so much for Medicaid 19   reimbursement; is that correct? 20   A. We have a budget, absolutely. 21   Q. So was the dispensing fee lowered at this time 22   because of budgetary limitations? 23   A. That was the primary driver and it was the 24   overall dispensing fee. As you see, the dispensing 25   expense, 5.27 was actually an increase from the 4.55.	1    There's lots of folks in Texas Medicaid. I think that 2    probably within the Vendor Drug Program there was some 3    skepticism and some concerns that it didn't necessarily 4    coincide with the federal requirements or wasn't 5    consistent with the federal requirements for cost-based 6    reimbursement. I don't know what the rate-setting area 7    might have thought. 8    Q. (By Mr. Berlin) Because the folks -- you knew 9    the folks in the Vendor Drug Program were concerned that 10   lowering the dispensing fee like that would result in 11   under-reimbursing pharmacists for their dispensing 12   costs? 13   MS. JACOBS: Objection, form. 14   A. I think there were concerns that that was a 15   significant reduction and that in fact there might be 16   some issues with pharmacies dropping out of the program. 17   Q. (By Mr. Berlin) For determining a fair 18   Medicaid reimbursement, a reasonable -- a reasonable 19   Medicaid dispensing fee, was there a recognition that 20   dispensing Medicaid drugs or dispensing to Medicaid 21   patients could be more expensive than dispensing to the 22   general population? 23   MS. JACOBS: Objection, form. 24   A. That's been an issue, a concern, that's out 25   there. I don't recall, I think Myers and Stauffer

<p style="text-align: right;">Page 221</p> <p>1 Q. (By Mr. Berlin) I want to just make sure I 2 have all your reasons. If it's that we've been busy, 3 that's fine. I want to make sure that at this juncture 4 I'm getting your entire explanation.</p> <p>5 MS. JACOBS: Objection, form.</p> <p>6 MR. ANDERSON: Objection, scope.</p> <p>7 A. And I don't think it's a specific reason to do 8 it or to not do it. It just hasn't been done to this 9 time.</p> <p>10 Q. (By Mr. Berlin) Have there been -- you say 11 there wasn't a specific -- a proposal to move forward 12 with a specific rule change. Have there been 13 considerations of doing that?</p> <p>14 A. There have been considerations of 15 reimbursement. Again, I can't give you specific dates 16 or meeting times or people in attendance, but -- other 17 than the discussions that went on with the pharmacy 18 association.</p> <p>19 Q. Back in 2002 and 2003?</p> <p>20 A. No, those were -- those started probably fall 21 '03 and went through '04.</p> <p>22 Q. You're referring to the pharmacy work group 23 that was formed at that time?</p> <p>24 A. Yes.</p> <p>25 Q. As part of that pharmacy work group, did Texas</p>	<p style="text-align: right;">Page 223</p> <p>1 scenarios.</p> <p>2 Q. But Texas Medicaid never tried to get them 3 implemented?</p> <p>4 A. No.</p> <p>5 Q. And then we were discussing the ingredient 6 costs. What different dispensing fee reimbursements 7 were considered between December 2002 and the present?</p> <p>8 A. Other than the 6.04, I'm not --</p> <p>9 Q. After the 6.04. The 6.04, that whole 10 reimbursement formula was blocked so it returned to the 11 old dispensing fee, right?</p> <p>12 A. Yes.</p> <p>13 Q. So after the -- it returned to the old 14 dispensing fee, did Texas Medicaid consider making any 15 adjustments to the reimbursement for dispensing fee or 16 inventory management factor?</p> <p>17 A. The 6.04 number was still there and viewed as a 18 reasonable number.</p> <p>19 Q. Well, after the TRO, did the dispensing fee 20 return to \$5.27?</p> <p>21 A. Yes.</p> <p>22 Q. And from the TRO until, let's just take 2003, 23 did the dispensing fee change in 2003?</p> <p>24 A. The dispensing fee was reduced 2-1/2 percent in 25 I believe October -- October or November '03.</p>
<p style="text-align: right;">Page 222</p> <p>1 Medicaid bring any specific proposals to the 2 pharmacists?</p> <p>3 MS. JACOBS: Objection, form.</p> <p>4 MR. ANDERSON: Objection, scope.</p> <p>5 A. There were some proposals that Merle did 6 present to his leadership I guess, Tom Suehs. TPA, I 7 guess, saw them. I don't know that we specifically 8 presented them to TPA.</p> <p>9 Q. (By Mr. Berlin) Who did you say Tom -- excuse 10 me. To whom did you say Merle Moden presented them 11 internally?</p> <p>12 MS. JACOBS: Objection, form.</p> <p>13 A. Tom Suehs.</p> <p>14 Q. (By Mr. Berlin) And what were those proposals 15 that were presented?</p> <p>16 A. I don't remember all of the -- there were 17 several options. One was -- I know had something to do 18 with different payments based on the percent of a 19 pharmacy's business that was Medicaid, although that's 20 difficult to determine.</p> <p>21 Q. What other proposals were there in addition to 22 that?</p> <p>23 A. There were two or three others that I think 24 might have been different. I don't remember the 25 specifics of them. Probably two or three different</p>	<p style="text-align: right;">Page 224</p> <p>1 Q. Could you look back at Exhibit 840. That's the 2 time line. And can you look at No. 45 on page 3.</p> <p>3 A. Yes.</p> <p>4 Q. It says, "October 5, '03 - Fee \$5.14, Inventory 5 Management Factor" -- it does say "\$0.9805, Delivery 6 \$0.15, WAC plus 12 percent, AWP minus 15 percent." Does 7 that accurately reflect the formula at that time?</p> <p>8 A. That was the fee after the 2-1/2 percent 9 reduction.</p> <p>10 Q. And why was there a 2-1/2 percent reduction?</p> <p>11 A. Because the legislature said reduce it 2-1/2 12 percent during the '03 legislative session.</p> <p>13 Q. And then the inventory management factor, that 14 was lowered as well?</p> <p>15 A. It was reduced 2-1/2 percent.</p> <p>16 Q. Actually this dollar sign 0.9805, is it 17 actually -- I mean, that should be expressed as a 18 percentage?</p> <p>19 MS. JACOBS: Objection, form.</p> <p>20 A. That .9805 is what you divide by at the -- the 21 last step in the equation, and that number represents a 22 2-1/2 percent reduction from the .98.</p> <p>23 Q. (By Mr. Berlin) It's a 2-1/2 percent reduction 24 of 2 percent?</p> <p>25 A. Yes.</p>